IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 53 OF 1999

M/s. Goa Antiobiotics &
Pharmaceuticals Limited,
Tuem, Pernem, (Goa). ... Appellants

versus

1. Mr. Namdev Shankar
Harmalkar, resident
of Harmalkar vaddo,
Tuem, Pernem (Goa)
(since deceased)
represented by his
following legal
representatives:

(a) Mrs. Bharati Babulal
Modi, daughter of
Mr. Namdev Shankar
Harmalkar and her
husband,

(b) Mr. Babulal A. Modi,
Both residents of
House No.376, Harmalkar
Wado, Tuem, Pernem(Goa),

(c) Mrs. Rajeseri Rajendra
Naik, daughter of
Mr. Namdev Shankar
Harmalkar and her husband,

(d) Mr. Rajendra V. Naik,
both residents of
Cotovaddo, Tuem, Pernem,
(Goa).

(e) Miss Indira N. Harmalkar,
Daughter of Mr. Namdev
Shankar Harmalkar,
Unmarried, resident of
House No.376, Harmalkar
Wado, Tuem, Pernem,(Goa),

(f) Miss Savita N. Harmalkar,
daughter of Mr. Namdev
Shankar Harmalkar, Unmarried,
resident of House No.376,
Harmalkar Wado, Tuem,
Pernem, (Goa).

(g) Mr. Uttam N. Harmalkar,
son of Mr. Namdev Shankar
Harmalkar, Unmarried,
resident of House No.376,
Harmalkar Wado, Tuem,
Pernem, (Goa).

2. Mr. Dimas S. Fernandes,
Vai Dongor, Modio Vaddo,
Post Parxem, Pernem, (Goa). ... Respondents

Mr. J. P. D'Souza and Ms. Caroline Collasso, Advocates for the Appellants.

None for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 22ND JULY, 2004.

ORAL JUDGMENT

This is Plaintiffs Second Appeal arising from Regular Civil Suit No.82/90.

2. The Appeal was admitted but no substantial question of law was framed. The said substantial question of law, as Shri J. P. D'Souza, learned Counsel of the Plaintiffs/Appellants, submits relates to the perversity of findings of both the Courts below based on documents which have not been considered in their proper perspective.

3. The parties hereto shall be referred to in the names as they appear in the cause title of the suit.

4. The Plaintiffs are a Government Company registered under the Companies Act, 1956. Their case was that the land surveyed under No.47/0 belonged to the Government and that by a Lease Deed dated 19th April, 1982, the Government was pleased to lease to the Plaintiffs a portion of the said Survey No.47 admeasuring 84,413 sq. metres. The case of the Plaintiffs was that their name appeared as lessees in respect of the said portion of the property and that the remaining portion was in possession of the Forest Department of the Government.

5. The Plaintiffs pleaded that after the grant of the said lease, they had put up a compound wall on the northern side, eastern side and western side and the property was partially fenced with cement poles and barbed wires on the southern, eastern and western sides. The Plaintiffs further pleaded that on the western side, near the main gate of the factory complex of the Plaintiffs and outside the compound wall belonging to the Plaintiffs, there were some illegal structures existing at the time of acquiring of the lease by the Plaintiffs and that on the southern side bearing Survey Nos.52 and 53, there are plots now belonging to the Industrial Development Corporation and which Corporation had erected a barbed wire fencing on the common boundary line of the properety leased to the Plaintiffs and the property of

the said Industrial Development Corporation.

6. The Plaintiffs stated that the name of Defendant No.2 appeared in the other column of form nos.I and XIV in respect of Survey No.48. The Plaintiffs further pleaded that Defendant No.1 claimed to be the owner in possession of a portion admeasuring 2,045 sq. metres. The Plaintiffs stated that somewhere in the year 1988 the Defendant No.1 along with some others raised some dispute with the officials of the Plaintiffs regarding the survey demarcations of the property surveyed under No.47 and, therefore, the Plaintiffs approached the Land Survey Authorities for re-survey and re-demarcations of the property leased to the Plaintiffs from Survey No.47. The Plaintiffs stated that in response to their request the Deputy Collector at Mapusa started demarcation proceedings of Survey No.47. The Plaintiffs pleaded that during the third week of December, 1989, Defendant No.2 brought some building material and dumped the same on the property belonging to the said Industrial Development Corporation and thereafter Defendant No.2 with the active support of Defendant No.1 started excavations on the other side of the fence and in the portion leased to the Plaintiffs. The Plaintiffs stated that they complained regarding the said encroachment of Defendant No.2 to the Mapusa Police, Village Panchayat etc. and although, the work of the

said illegal structure was stopped on or about 27th December, 1989, the same was resumed after about four days. The Plaintiffs, therefore, filed a suit for declaration that the incomplete structure erected by the Defendants in Survey No.47 was illegal. The Plaintiffs also prayed, amongst other reliefs, for a mandatory injunction directing the Defendants to demolish the said illegal structure erected in Survey No.47.

7. The Defendant No.1 contested the suit and admitted that Survey No.47 belonged to the Government but stated that at the time of preparation of survey records an area of about 4020 sq. metres of the property leased to him by the Government was wrongly included in Survey No.47. The Defendant No.1 also admitted that the said Industrial Development Corporation had erected a barbed wire fencing on the boundary of the said Corporation, the property belonging to the Plaintiffs and the property belonging to Defendant No.1. The Defendant No.1 stated that Defendant No.2 was in possession of a portion of Survey No.48 and that the officials of the Plaintiffs were trying to encroach into the property of Defendant No.1 bearing Survey No.48 and, therefore, Defendant No.1 raised objections to such encroachments. The Defendant No.1 stated that the excavations done by the Defendant No.2 are in the property leased to Defendant No.1 by the Government and surveyed under No.48 and not in the

portion of the property surveyed under No.47 leased to the Plaintiffs. The Defendant No.1 has further stated that the said structure was erected by Defendant No.2 and not by Defendant No.1 and that the Defendant No.1 had not done any opening through the barbed wire fencing. The Defendant No.1 reiterated that he has got a right to the said 4020 sq. metres now falling in the property surveyed under No.47 which in fact formed part of the property leased to Defendant No.1 by the Government and which area has been wrongly included in Survey No.47. The Defendant No.1 stated that he was not putting up any illegal structure either in Survey No. 47 or Survey No.48.

8. The Defendant No.2 also admitted that the total area of Survey No.47 was 1,10,000 sq. metres and that was surveyed in the name of the Government as owner. The Defendant No.2 also admitted that there was a compound wall on the northern, eastern and western sides and there was a barbed wire fencing in a small portion but denied that it is the Plaintiffs who had put the said compound wall and the fencing.

9. The Defendant No.2 pleaded that in the survey records the name of Defendant No.1 appeared as co-owner in the occupants column of Survey No.48/0 and that for the first time the Plaintiffs raised a dispute claiming a

portion of Survey No. 48/0 as part of Survey No.47/0. The Defendant No.2 stated that Defendant No.1 had sold a plot of land admeasuring 744 sq. metres being part of Survey No.47/0 wherein Defendant No.2 constructed a shed. The Defendant No.2 denied that he had taken building material through the property of Industrial Development Corporation. The Defendant No.2 admitted having raised two stone walls and covered the same with A.C. cement sheets and as he had to proceed to Bombay he could not complete the remaining part of the said structure.

10. After issues were framed, the Plaintiffs examined their Company Secretary and Attorney in support of their case and produced form Nos.I and XIV of Survey No.47/0, a plan of Survey Nos.47, 48, 52 and 53 and the Lease Deed executed by the Government dated 19th April, 1982 in favour of the Plaintiffs. The photographs of the suit structure were also produced. The Plaintiffs also produced the proceedings of demarcation on the reverse of which a plan of Survey No.47 was drawn and the suit structure was shown as falling in Survey No.47. The Plaintiffs also produced an undertaking given by Defendant No.1. On the other hand, the Defendant No.1 examined himself and produced a copy of a plan No.18671. This plan on the very face of it shows that it is a plan of Government plot known as 'Rajuchi Moly' situated at Tuem Village, Pedne Taluka, to be leased to Defendant

No.1(Namdev Shankar Harmalkar). The Defendant No.1 also produced a copy of the Notice which he received and which was issued under Section 12(2) of the Land Acquisition Act,1894. The said Notice pertains to acquisition of an area of 28,528 sq. metres of Survey No.48(Part)(Emphasis supplied).

11. Although, the Lease Deed(Exh.PW1/C) executed by the Government in favour of the Plaintiffs was accompanied by a plan, as informed by Mr. J. P. D'Souza, learned Counsel of the Plaintiffs/Appellants, the said plan was not produced by the Plaintiffs in their evidence. However, the Court Commissioner, C.W.1, Shri G. N. Palenkar, who was examined before the trial Court had stated that he had inspected the documents of the Plaintiffs as well as the Defendants. He had tried to locate the property which was to be leased to Defendant No.1 vide Exh.DW1/A and he had opined that the said property partly fell in Survey No.47 and partly in Survey No.48. The said Commissioner incorporated the plan of the Plaintiffs in the plan prepared by him.

12. The said Commissioner on the plan prepared by him and produced at Exh.CW1/A has shown the respective plans of the properties claimed by Defendant No.1 as well as the property claimed by the Plaintiffs. Although, the property claimed by Defendant No.1 as per the said plan

No.18671 is admeasuring about 41,000 sq. metres according to Mr. D'Souza, learned Counsel of the Plaintiffs, it is pertinent to note that Defendant No.1 did not take such a plea in the written statement.

13. The learned trial Court did not at all examine the documents produced by both the parties to which I have referred to herein above nor the evidence produced in proper perspective. The learned trial Court gave a finding that the suit structure which according to the Defendants was falling in Survey No.48 did fall in Survey No.47/0. That conclusion was escapable because the Plaintiffs apart from alleging that it was falling in Survey No.47/0 had produced the proceedings of the Deputy Collector who had clearly shown that the suit structure fell in Survey No.47/0.

14. However, the learned trial Court observing that the Defendant No.1 had proved that he was granted lease of the property vide Exh.DW1/A and as the Plaintiffs had not produced any sketch showing the encroachment made by the Defendants proceeded to dismiss the suit.

15. The first appellate Court dismissed the Appeal observing that the Plaintiffs had failed to establish as to how the trial Court had fallen in error in giving a finding against the Plaintiffs. As already stated, both

the Courts below have not at all examined the documents produced by both the parties, in their proper perspective.

16. Admittedly, the land of Survey No.47 admeasuring 1,10,000 sq. metres belonged to the Government and it has been shown to belong to the Government on form Nos.I and XIV produced by the Plaintiffs. The case of the Plaintiffs was that they were granted by the Government an area of 84,318 sq. metres and in support of the same had produced their Lease Deed. As against the said document produced by the Plaintiffs, the Defendants had not to produce any document of their title. I say so because Defendant No.1 had produced the said plan Exh. DW1/A being a plan of an area which was only to be leased to Defendant No.1. Nothing prevented Defendant No.1 to produce the actual Lease Deed executed in his favour by the Government pursuant to the said plan which was prepared. There was no explanation from either Defendant No.1 or for that matter Defendant No.2 that in case the Defendant No.1 was in possession of the said area as depicted on the said plan Exh.DW1/A, how his name did not figure in the survey record of form Nos.I and XIV in case an area of 4020 sq. metres which was granted to Defendant No.1 was wrongly surveyed subsequently in Survey No.47. There was certainly a presumption to be drawn in favour of the

Government that the entire land of Survey No.47 belonged to the Government, which fact was otherwise admitted by both the Defendants. The Plaintiffs had only stated that the area of 84,413 sq. metres were leased to them by the Government. The area leased by the Government to the Plaintiffs was subsequently fenced by the Plaintiffs which infact was admitted by the Defendants. It was not the case of the Defendants that this fence was erected by excluding the area of 4020 sq. metres claimed by them from Survey No.47. The area leased by the Government to the Plaintiffs was subsequently demarcated by the Deputy Collector as could be seen from the plan prepared by him and produced by the Plaintiffs. The suit structure admittedly falls in Survey No.47. The Defendants' claim that the said structure fell in the property leased to Defendant No.1 surveyed under No.48 could not be accepted. Infact, the Defendants made no attempt in the trial of the suit as to where exactly the said area of 4020 sq. metres fell in Survey No.47.

17. The Plaintiffs had proved their case by producing their title documents as well as the proceedings of the demarcation carried out by the Deputy Collector. Even assuming some land was leased to the Defendants, the same was probably part of Survey No.48 and not of Survey No.47. As already stated, the Defendants had not at all produced any document of their

title and their entire case was based on the said plan DW1/A which was only a plan of a proposed lease to be made in favour of Defendant No.1. Both the Courts below have grossly erred in not examining the documents produced by the Plaintiffs in their proper perspective. Their approach has been grossly perverse and erroneous. Consequently, the Appeal deserves to succeed. The Judgments and Orders of both the Courts below deserves to be set aside. Consequently, the suit of the Plaintiffs deserves to succeed in terms of prayers (A), (B) and (C) of the plaint.

18. The Defendants are, therefore, hereby directed to remove the suit structure from Survey No.47 now leased to the Plaintiffs by the Government.

N. A. BRITTO, J.

RD.